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CHARLES ELMORE CROPLEY

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 466

WEST TEXAS UTILITIES COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AND

BRIEF IN SUPPORT THEREOF

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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

WEST TEXAS UTILITIES COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petition of West Texas Utilities Company, Inc. respectfully prays that this Court shall grant a writ of certiorari to the United States Court of Appeals for the District of Columbia which affirmed the order of the National Labor Relations Board ordering Petitioner to bargain collectively with the International Brotherhood of Electrical Workers, Locals 898, 920 and 1044, AFL, as the exclusive representative of all employees in the Petitioner's transmission, distribution and service departments with certain exceptions.[1]

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[1] Joint Appendix, page 42.

OPINIONS BELOW

The Opinion and Order of the National Labor Relations Board is set forth in the Joint Appendix on pages 35 through 43, and is reported in 85 N. L. R. B. 1396. The Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 179 through 186 in the Joint Appendix, and is reported in 184 Fed. 2d 233.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 10th day of July, 1950. Petitioners' petition for a rehearing and modification of the order was denied on September 28, 1950. Jurisdiction of this Court is invoked under Sections 1254 and 2101 of Title 28, United States Code, and Section 10(F) of the National Labor Relations Act, 29 U. S. C. A., 160(F), as amended by the Labor Management Relations Act, 1947. Petitioner also relies on Rule 38, Paragraphs 5(b) and 5(c) of this Court for its grounds upon which this petition is made.

STATUTES INVOLVED

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Supp. I, Sections 141, et seq.—[1]

QUESTIONS PRESENTED AND ERRORS URGED

1. The Honorable Court of Appeals erred in its conclusion of law that Section 9(h) of the Labor Management

[1] Pertinent sections of Act printed in Appendix (5) of this petition and brief.

Relations Act, 1947, does not require the officers of the AFL to file the required affidavits as a condition precedent to any recourse by the Union to the facilities of the Board.

2. The Court of Appeals erred in holding that Petitioner, in relying upon a legal interpretation of the General Counsel of the Board that a labor organization is not in compliance with the requirements of Section 9(h), violates Section 8(a)(5) of the Act by refusing to bargain with that labor organization.

3. The Court of Appeals erred in deciding an important question of law (not raised or litigated by the principal parties to the litigation) which was raised for the first time in the Court of Appeals by an intervenor who had participated in the proceedings before the Board but had not raised the question there.

4. The Court of Appeals erred in holding that an employer violates Section 8(a)(5) of the Act by refusing to bargain with a local labor organization at a time when, due to the failure of the officers of the AFL to file the affidavits required by Section 9(h) of the Act, it is not entitled to invoke the remedial processes of the Act.

5. The Court of Appeals erred in holding that, in the absence of any evidence of causation and in the face of affirmative evidence to the contrary, the Board may indulge in a presumption that an employer's refusal to bargain caused a labor organization to lose the support of a majority of the employer's employees.

6. The Honorable Court of Appeals erred in sanctioning the Board's indulgence in a purely fictive attribution of a casual relationship between Petitioner's asserted unlawful refusal to bargain on September 19, 1947, because of the Union's non-compliance and the finding concerning the Union's loss of majority.

7. The Honorable Court of Appeals erred in upholding the Board's conclusion of law that Petitioner unlawfully refused to bargain with the Union on and after September 19, 1947.

8. The Honorable Court of Appeals erred in failing to find that Petitioner's refusal to bargain on November 8, 1947, and thereafter was justified by its well founded doubt of the Union's status as the representative of the majority of the employees in the appropriate unit.

9. The Honorable Court of Appeals erred in ordering Petitioner to bargain collectively with the Union as a representative of the majority of Petitioner's employees in the appropriate bargaining unit at a time when the Union no longer represented a majority of Petitioner's employees.

10. The Honorable Court of Appeals erred in refusing to set aside the Board's order.

11. The Honorable Court of Appeals erred in ordering enforcement of the Board's order.

STATEMENT OF THE CASE

Review is sought of the Order of the Honorable Court of Appeals requiring Petitioner to cease and desist from

refusing to bargain with the International Brotherhood of Electrical Workers, Locals Nos. 898, 920 and 1044, AFL. These locals had been certified as the representative of the majority of the employees in an appropriate bargaining unit on August 12, 1946. During the period from September 19, 1947, to October 18, 1947, Petitioner refused to bargain basing such refusal on the express views of the Board's General Counsel that the officers of the American Federation of Labor (with which the IBEW is affiliated) must first file non-communist affidavits. The Board subsequently repudiated this interpretation,[1] and the company agreed to resume collective bargaining on November 10, 1947. On November 8, 1947, the company refused to bargain further because of the uncontradicted evidence that the Locals no longer represented a majority of the employees. A charge of unfair labor practice was then filed by the Locals and a complaint was issued by the General Counsel on June 24, 1948. We are not in accord with the statement made by the Honorable Court of Appeals to the effect that "Meanwhile, on November 8, the Federation officers had filed the affidavits allegedly required of them by 9(h), 29 U. S. C. A., Sec. 159(h)."[2] We are unable to find in the record any evidence of the date upon which the officers of the American Federation of Labor did comply with the filing of the non-communist affidavits.

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[1] *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11 (1947).

[2] Joint Appendix, page 180.

REASONS FOR GRANTING THE WRIT

I.

The Honorable Court of Appeals for the District of Columbia Circuit has rendered a decision with a dissent by one of the justices, which decision is in direct conflict with the unanimous decisions of two other United States Courts of Appeals.

II.

The Honorable United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal Law which has not been, but which should be, settled by this Honorable Court.

III.

The United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Honorable Court.

IV.

The United States Court of Appeals for the District of Columbia has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court, and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The argument of Petitioner in support of this Petition for Writ of Certiorari covering each of the aforesaid reasons for the granting of this Writ will be set forth in detail in the brief of Petitioner which is made a part of this instrument.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia Circuit commanding that Court to certify and send to this Court for review and determination on a date certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,465, *West Texas Utilities Company, Inc., Petitioner v. National Labor Relations Board, Respondent, International Brotherhood of Electrical Workers (AFL), Intervenor,* and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein and may have such other and further relief as may be just in the premises.

Respectfully submitted,

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I certify that copies of this petition have been furnished the Respondent, National Labor Relations Board and Intervenor, International Brotherhood of Electrical Workers (AFL).

FRANK CAIN.

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

WEST TEXAS UTILITIES COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the United States Supreme Court:

STATEMENT OF THE CASE

A statement of the case has already been given in the Petition and for purposes of brevity it will not be repeated here.

ARGUMENT

Introduction

This Honorable Court has only recently in a most exhaustive opinion decided the constitutionality of Section 9(h) of the Labor-Management Relations Act of 1947.[1]

[1] *American Communications Assn. v. Douds*, 70 Sup. Ct. 674.

This Section is most commonly referred to as the "Non Communist Affidavit" provision.

In that case, this Court pointed out the fundamental purpose of the National Labor Relations Act which made the Act itself constitutional. The Court further pointed out that the Act was amended twelve years later to remove additional impediments to the free flow of commerce by passage of the Labor-Management Relations Act, 1947. The Court deemed it sufficient to state in its majority opinion that Congress had a great mass of material before it which tended to show that Communists and others prescribed by the statute had infiltrated union organizations for the prime purpose of furthering their advocacy of illegal overthrow of our form of government.

This provision of the statute and its application is the subject of this Petition. It is interesting to note that the conflicting opinions of both the United States Court of Appeals for the Fourth Circuit[1] and the United States Court of Appeals for the District of Columbia,[2] in which they predicate much of their respective conclusions upon the reasoning given by this Court in that case in construing the applicability of Section 9(h) of the Act.

It would appear to us that Congress surely intended to close all the avenues to such treasonable forces and foreclose the possibility of those forces furthering their illegal purposes. "No chain is stronger than its weakest link." The

[1] *National Labor Relations Board v. Highland Park Mfg. Co.*, No. 6082, reported in full in Appendix (1) of this brief.

[2] *West Texas Utilities Co. v. National Labor Relations Board*, No. 10465, reported in full in Appendix (2) of this brief.

decision of the United States Court of Appeals for the District of Columbia not only opens the avenue for such infiltration into the ranks of labor, but effectively destroys the purpose and intent of such provision of the Act.

I.

The Honorable Court of Appeals for the District of Columbia Circuit has rendered a decision with a dissent by one of the Justices, which decision is in direct conflict with the unanimous decisions of two other United States Courts of Appeals.

The United States Court of Appeals for the Fifth Circuit in the case of *National Labor Relations Board v. Postex Cotton Mills, Inc.*,[1] on May 5, 1950, by unanimous decision held that officers of the Congress of Industrial Organization (CIO) were obligated under Section 9(h) of the Labor Management Relations Act, 1947, to file the non-communist affidavit, and their failure to do so with regard to that case caused the Court to refuse to enforce the order of the Board, and dismissed the same.

The National Labor Relations Board chose not to petition this Court for a Writ of Certiorari, and permitted the decision of that case to stand.

In the case at bar, the opinion of which is reported in full in the appendix to this brief, the United States Court of Appeals took cognizance of the fact that their decision

[1] *N. L. R. B. v. Postex Cotton Mills, Inc.*, 26 L. R. R. M. 2359, reported in full in Appendix (3) of this brief.

in this case was in direct conflict with the decision of the Court of Appeals for the Fifth Circuit when it said:

> "We are aware that our construction of 9(h) is in conflict with that of the Fifth Circuit in National Labor Relations Board v. Postex Cotton Mills, No. 12888 (5 Cir., May 5, 1950)."

The United States Court of Appeals for the Fourth Circuit agreed with the Fifth Circuit in the case of *National Labor Relations Board v. Highland Park Manufacturing Co.*, 26 L. R. R. M. 2531, on September 2, 1950, and disagreed with the United States Court of Appeals for the District of Columbia in which decision the court said in part:

> "We have carefully considered the argument to the contrary in the majority opinion in West Texas Utilities Co. v. N. L. R. B., D. C. App.—Fed. 2d—(26 L. R. R. M. 2359); but we are not impressed by it. We agree with the statement of Judge Russell in the Postex case, supra, that the Congressional purpose was to 'wholly eradicate and bar from leadership in the American Labor Movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our government'."

On December 1, 1950, the Board filed in this Court its petition for certiorari (No. 425) to review this decision of the Court of Appeals for the Fourth Circuit.

We cannot conceive of a better grounds for this Honorable Court to grant this Writ. The question should be settled by this Court to stop the discriminatory application of this section of the law by the Board as it has not chosen to heed the unanimous opinions of two of the Courts of

Appeals, thus making the question of rights under the Act dependent upon what Circuit of the United States Court of Appeals the employer may find his case.

Upon the granting of this writ, Petitioner will file a complete brief upholding the position of the Fourth and Fifth Circuits on this point of law.

II.

The Honorable United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal Law which has not been, but which should be, settled by this Honorable Court.

III.

The United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Honorable Court.

We shall argue these points together. As we have stated, the importance of the questions, of law raised by this Petition does not appear to us to even be questionable. However, in another respect, we suggest to be of even greater importance, is the very grievous error of the Court of Appeals in going completely outside the record and issues tried before the National Labor Relations Board and overruling a case of long standing decided by the Board regarding the construction and application of Section 9(h) of the Act.[1] This latter part of the Court of Appeals' decision

[1] *Matter of Andrews*, 87 N. L. R. B. No. 62, excerpts from case copied in Appendix (4) to this brief.

not only opens the gate wide in destroying the spirit and intent of the section, but VERY EFFECTIVELY NULLIFIES THE SECTION ITSELF, which we shall conclusively show in our brief on the merits of this case.

In Petitioner's motion for rehearing before the Court of Appeals, we pointed out that the Court had decided a question which was raised for the first time in the Court by the Intervenor Union. It was not raised by the Union before the Board (although the Union was a party to and participated in the proceedings below), nor by the General Counsel of the Board, nor by Petitioner.

Under these circumstances the Court's disapproval of the *Andrews* case and its contrary interpretation of Section 9(h) is in striking conflict with its holding in Part III of the Opinion where it refuses to consider a defense sought to be raised by Petitioner for the first time in that Court. If its decision in Part III is correct, the Court should equally have declined to consider this question also raised for the first time in that Court by Intervenor. If the Court of Appeals was to consider and decide this question, it should have had the benefit of full briefing and litigation of the question by the Board and by Petitioner, which it certainly did not have and refused to accept by overruling the Motion for Rehearing.

In such a full briefing and argument, Petitioner will show unto this Court that the Court of Appeals' interpretation of the Statute to require employers to bargain with labor organizations at a time when the non-communist disclaimer provisions are uncomplied with opens the door to

the very type of communist infiltration and disruption which Congress was at such pains to curb. Plainly the Court should not have, by deciding an unlitigated issue, rendered the statute in a manner so flagrantly designed as to thwart the Congressional purpose.

In the first place, the Court of Appeals assumed that the AFL had complied with the affidavit filing requirements at the time of the issuance of the General Counsel's complaint. Actually, there is nothing in the record of this case to show that the AFL has ever complied with the provisions of Section 9(h).

If this question were fully litigated, Petitioner would undertake to show that the procedure whereby the AFL sought to come into compliance with the requirements of Section 9(h) was ineffective to accomplish its purpose, and that, therefore, the AFL was not in compliance with Section 9(h) at the time the complaint was issued.

We urgently request this Honorable Court to review this erroneous decision of law by the Court of Appeals because such decision will place a burden of peril upon every employer, which will compel them, for economic reasons, if for no other, to disregard entirely the questions of whether or not they are dealing with outright communists in recognizing a union, settling grievances, or bargaining collectively with them. No employer would take the chance of using Section 9(h) as reason for refusing to deal with the known communist officers of a union whose refusal could, and possibly would, result in a strike, even though the employer knew that the union could not use

the facilities of the Board so long as this condition existed. The employer would know that at any time within a period of six months from date of his refusal the union could elect new officers who would sign the Non-Communist Affidavits and an unfair labor practice charge based on the decision of the Court of Appeals in this case could be brought and successfully prosecuted, resulting in irreparable injury to the employer. The technical reasoning of the court below is without foundation of fact or precedent and is contrary not only to the law, but is a flagrant destruction of the most "proven tool" that this Government has initiated in combating the infiltration of these treasonable forces into the ranks of labor.

IV.

The United States Court of Appeals for the District of Columbia has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court, and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

In Part IV of its Opinion the Court of Appeals sanctioned the Board's indulgence in a purely fictive attribution of a causal relationship between Petitioner's asserted unlawful refusal to bargain on September 19, 1947, and the Union's loss of majority as of the date Petitioner refused to bargain further with the Union because of the uncontradicted evidence showing such loss of majority as of November 8, 1947. The Board made no finding of fact upon the basis of evidence in the record to support

this fictive attribution. It could not have done so because there is no evidence in the record to support this conclusion of causation. In fact, all of the evidence in the record negates the factual existence of such a causal relationship.[1]

In these factual circumstances the Court of Appeals has misapprehended the significance of the Supreme Court authorities relied upon by it, as well as the clear mandate of Section 10 of the Act.

As authority for permitting the Board to indulge this presumption of fictive attribution of causal relationship, without regard to evidence in the record and, in fact, in the teeth of the evidence, the court cites *Franks Bros. Co. v. N. L. R. B.*, 321 U. S. 702; *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 983, and *N. L. R. B. v. Lorillard Co.*, 16 N. L. R. B. 684, 699-701.

None of these cases, however, will sustain this proposition.

The *Franks Bros.* dealt with a situation in which the Union concededly represented a majority of the employees at the time of the employer's refusal to bargain, and the Supreme Court approved the Board's order to bargain on the basis that the Board may properly conclude that, "A requirement that union membership be kept intact during delays incident to hearings would result in per-

[1] Even allowing that Petitioner is precluded from relying on the evidence in the record to establish the loss of majority prior to September 19, 1947, as a justification for the refusal to bargain on that date, the Board may not disregard that evidence to hold Petitioner guilty of a later refusal to bargain at a time when the evidence clearly showed that the Union no longer represented a majority of the employees.

mitting employers to profit from their own wrongful refusal to bargain." 321 U. S. at page 704.

Examination of the opinion of the Circuit Court of Appeals, which was affirmed by the Supreme Court, clearly reveals that neither Court was approving a fictive attribution without regard to evidence, but rather a conclusion based upon evidence. The Court of Appeals recited the evidence which it conceived to give rise to the permissible inference of a causal connection between employer's conduct and the Union's loss of majority. 137 Fed. 2d 989 at 994, 995.

In the *Medo Photo* case, the Board found that the employees' repudiation of the union was induced by the employer's direct dealing with the employees. This finding was sustained by the Supreme Court as a finding of fact, based upon evidence, and not as a permissive fictive attribution without regard to evidence. It said:

> "From this and from evidence which it is unnecessary to detail, the Board concluded, and we accept its findings that the employees had not revoked their designation of the union as their bargaining agent before the wage increases were promised by petitioner's manager on June 9th; that the increases were induced by negotiations begun with petitioner on June 7th and concluded on June 9th before they had repudiated the union; that petitioner's determination to increase wages was 'occasioned solely by the employees' offer to withdraw from the union if the raises were granted,' and that the employees' defection from the union was induced by petitioner's conduct in dealing directly with the employees." 321 U. S. at page 681.

And, if there could be any question as to the scope of the *Franks Bros.* doctrine, the Supreme Court set it at rest in a footnote to the above quoted statement:

> "It has now long been settled that FINDINGS OF THE BOARD, AS WITH THOSE OF OTHER ADMINISTRATIVE AGENTS, ARE CONCLUSIVE UPON REVIEWING COURTS WHEN SUPPORTED BY EVIDENCE, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised, and that upon such questions of law, the experienced judgment of the Board is entitled to great weight." (Emphasis supplied.) 321 U. S. at page 681, footnote 1.

Like the *Franks Bros.* case, the *Lorillard* case involved a situation in which the union concededly possessed a majority at the time of the employer's refusal to bargain, and the Supreme Court sustained the Board's insistence that Lorillard "Must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain." This case, therefore, dealt with the appropriateness of the Board's remedy, and not with the question of causation.

The Requirements of Section 10 of the Act

As indicated above, the *Franks Bros.*, *Medo* and *Lorillard* cases afford no support for a presumption of a causal relation between the employers' unfair labor practices and the union's loss of majority. Each of those cases requires that the fact of causation be supported by a finding of fact

grounded upon substantial evidence in the record. Each of those cases was decided before the 1947 amendments to the Act.

Since the 1947 amendments to Section 10(c), (e), and (f) it is, we submit, plain that the Board's conclusion on such a question of fact must be supported by a finding of fact grounded upon a preponderance of the testimony [Section 10(c)] or in any case upon substantial evidence on the record considered as a whole [Section 10(e), (f)]. *Superior Engraving Company v. N. L. R. B.*, No. 9920, C. C. A. 7, cited June 27, 1950, 26 L. R. R. M. 2351, 2358; *Pittsburgh Steamship Co. v. N. L. R. B., 69 S. Ct. 1283, 337 U. S. 656, 93 L. Ed. 443.*

In the *Superior Engraving* case, the Court of Appeals for the Seventh Circuit stated:

> "The Board, finding no evidence in the record to indicate that the union withdraw its members from petitioner's employ, presumed that the loss of majority was due to petitioner's unfair labor practices. In view of the requirements in Section 10(c) of the Act as amended, that the Board's findings must be based on the preponderance of the testimony taken, it seems clear that the Board erred in conclusively presuming that the loss of majority was caused by petitioner's unfair labor practices, for, as examiner pointed out, all the men who were called as witnesses testified that they left for better paying jobs or to enter military service."

We submit that the Court of Appeals' approval of the Board's presumption, supported by no evidence and contradicted by such evidence as appears in the record, is in

conflict with all applicable authority, and requires setting aside of the Board's order.

CONCLUSION

We respectfully urge upon this Court the importance of the problems presented by this case and the urgent need for a decision by this Court upon the subject.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,465, *West Texas Utilities Company, Inc., Petitioner v. National Labor Relations Board, Respondent; International Brotherhood of Electrical Workers (AFL), Intervenor*, and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein, and may have such other and further relief as may be just in the premises.

Respectfully submitted,

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I certify that copies of this brief have been furnished the Respondent, National Labor Relations Board and Intervenor, International Brotherhood of Electrical Workers (AFL).

.....

FRANK CAIN.

APPENDIX 1

N. L. R. B. v. HIGHLAND PARK MFG. CO.
U. S. Court of Appeals, Fourth Circuit (Richmond)

NATIONAL LABOR RELATIONS BOARD v. HIGHLAND PARK MANUFACTURING COMPANY, No. 6082, SEPTEMBER 2, 1950.

26 L. R. R. M. 2531

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

Full Text of Opinion

Parker, Chief Judge:—This is a petition to enforce an order of the National Labor Relations Board which directed the Highland Park Manufacturing Co. at its Rock Hill, S. C. plant to bargain with the Textile Workers Union of America, affiliated with the C. I. O., as the bargaining agent of its employees. Question is raised as to whether the union obtained a majority vote in the election held to determine the bargaining representative, but we need not go into this, as we think that the Board proceeded upon an erroneous theory of law in ordering the company to bargain with T. W. U. A. upon its petition, when that union at the time was affiliated with the C. I. O., whose officers had not then complied with the statute requiring the filing of non communist affidavits. The Board applied the rule which it had laid down, contrary to the opinion of general counsel and with one member dissenting, in Matter of Northern Virginia Broadcasters 75 N. L. R. B. 11 [20 LRRM 1319]. The question presented here is identical with that before the Court of Appeals of the Fifth Circuit in N. L. R. B. v. Postex Cotton Mills 5 Cir. 181 F. 2d 919 [26 LRRM 2116], which involved the application of the same rule; and we agree with the decision of that court reversing the action of the Board for the reasons set forth in the comprehensive and able opinion of Judge Russell.

[THEORY OF BOARD]

We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that the power of the Board may not be invoked by a labor organization unless there is on file the affidavits which the statute requires executed "by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit."* The C. I. O. is unquestionably a national labor organization and the T. W. U. A. is admittedly affiliated with it. The argument of the Board that filing is required only of the officers of an organization of which the bargaining union is a constituent and subordinate unit is negatived by the language which requires filing by the officers of the international organization of which the bargaining union is "an affiliate" as well as where it is a "constituent unit."

[DOUDS CASE]

As there is no ambiguity in the language of the statute, there is no occasion to resort to the rules of construction; but, if resort be had to these, the result is the same. The reason and purpose of the provision was to eliminate communists and others seeking the overthrow of the government by force from positions in which they would be able to use the power of labor organization which the statute was fostering, in the aid of political strikes and other dan-

* The statute is as follows: "No investigation shall be made by the Board of any question affecting commerce concerning the representatives of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits." Sec. 9(h), Labor Management Relations Act, 61 Stat. 146, 29 USCA sec. 159(h).

gerous disruptions of industry. As to this Chief Justice Vinson in the recent case of C. I. O. v. Douds, 339 U. S. 382, 70 S. Ct. 674 [26 LRRM 2084], said:

> "The constitutional justification for the National Labor Relations Act was the power of Congress to protect interstate commerce by removing obstructions to the free flow of commerce. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 [1 LRR Man. 703] (1937). That Act was designed to remove obstructions caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining power between unorganized employees and their employers. It did so by strengthening employee groups, by restraining certain employer practices, and by encouraging the process of collective bargaining.
>
> "When the Labor-Management Relations Act was passed twelve years later, it was the view of Congress that additional impediments to the free flow of commerce made amendment of the original Act desirable. * * *
>
> "One such obstruction, which it was the purpose of sec. 9(h) of the Act to remove, was the so-called 'political strike.' Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. And other evidence supports the view that some union leaders who hold to a belief in violent overthrow of the Government for reasons other than loyalty to the Communist Party likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control. * * *

> "It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action."

Mr. Justice Jackson, in his concurring opinion in the Douds case, had this to say, as to the reason and purpose of the statutory provision:

> "The Communist Party * * * is not primarily interested in labor's vote, for it does not expect to win by votes. It strives for control of labor's coercive power—the strike, the sit-down, the slow-down, sabotage, or other means of producing industrial paralysis. Congress has legalized the strike as labor's weapon for improving its own lot. But where Communists have labor control, the strike can be and sometimes is perverted to a party weapon. In 1940 and 1941, undisclosed Communists used their labor offices to sabotage this Nation's effort to rebuild its own defenses. * * *
>
> "This labor leverage, however, usually can be obtained only by concealing the Communist tie from the union membership. Whatever grievances American workmen may have with American employers, they are too intelligent and informed to seek a remedy through a Communist Party which defends Soviet conscription of labor, forced labor camps and the police state. Hence the resort to concealment, and hence the resentment of laws to compel disclosure of Communist Party ties. The membership is not likely to entrust its bargaining power, its records, and its treasury to such hands. When it does, the union finds itself a more or less helpless captive of the Communist Party. Its officers cease to be interested in correcting grievances

but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive. They always follow the Communist Party line, without even knowing its source or its objectives. The most promising course of the Communist Party has been the undercover capture of the coercive power of strategic labor unions as a leverage to magnify its power over the American people."

[INTENTION OF CONGRESS]

In the light of this purpose, it is perfectly clear that it is much more important to exclude communists and others plotting the overthrow of the government by force from holding office in the great national labor organizations such as the C. I. O. and the A. F. L. than to exclude them from office holding in their affiliates; and it is not reasonable to suppose that Congress did not intend the officers of the former to be covered by its provisions. It is true that it is the officers of the affiliates who call the strikes; but it is the officers of the national or parent organizations who shape labor policies that cause the strikes to be called, and this is particularly true of general strikes or strikes having a political purpose. As was well said by Member Gray in his dissenting opinion in Northern Virginia Broadcasters, supra:

> "The officers of the A. F. L. and the C. I. O. have been recognized as the spokesmen and representatives of organized labor in this country. It was the A. F. L. Executive Council which recommended on December 15, 1941, that 'a no-strike policy shall be applied in all war and defense * * * industries.' On the following day, the conference of A. F. L. presidents adopted this recommendation.
>
> "The extent of the influence wielded by the A. F. L. is also apparent from the control which it exercises over the 'jurisdiction' of its member unions. Awards of the governing body may be subject to enforcement through explusion from the organization. Conversely, the member unions exercise a measure of control over

their parent organization through the election of its officers.

"It is therefore apparent that the A. F. L. may exercise direct and influential control over its constituent unions in important respects and that A. F. L. officers occupy a strategic position to affect the economic life of the Nation. Under these circumstances, it is inconceivable that Congress was not concerned with the Communist affiliation of the officers of the A. F. L. and C. I. O. in accomplishing its intended purpose of purging labor of Communist influence."

[TEXAS UTILITIES CASE]

We have carefully considered the argument to the contrary in the majority opinion in West Texas Utilities Co. v. N. L. R. B., D. C. App.—F. 2d—[26 LRRM 2359]; but we are not impressed by it. We agree with the statement of Judge Russell in the Postex case, supra, that the Congressional purpose was to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the communist party and believers in the constitutional overthrow of our government." If the statute is construed in accordance with its express language to deny governmental support to unions that are affiliated with national organizations which refuse to comply with its anti-communist provisions, the result will be either that the national organizations will comply with the statute, or that they will be segregated from the effective body of loyal American labor by the withdrawal of their affiliates. In either event, the labor movement will be effectively protected from the danger of communist leadership in the formulation of labor policies; and this is evidently the end to which the legislation was directed. We see no occasion to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind. The office of interpretation is to resolve ambiguities, not to create them.

Nothing contrary to our decision here was decided in N. L. R. B. v. Harris-Woodson Co., 179 F. 2d 720 [25

LRRM 2346], since in that case the question now before us was not raised. It was assumed in that case on all sides that the filing by the officers of the T. W. U. A. was a sufficient compliance with the statute and the only question was whether the bargaining union could avail itself of the change of affiliation which had taken place.

For the reasons stated, enforcement of the Board's order will be denied and the order will be set aside.

Enforcement denied.

APPENDIX 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10465

WEST TEXAS UTILITIES COMPANY, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (A. F. L.), *Intervenor.*

On Petition to Review and on Cross Petition for Enforcement of an Order of the National Labor Relations Board

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Argued May 22, 1950 Decided July 10,1950

Before Edgerton, Wilbur K. Miller and Bazelon, Circuit Judges.

BAZELON, Circuit Judge: Review is sought of a Board order requiring petitioner to cease and desist from refusing to bargain with three locals of the International Brotherhood of Electrical Workers,[1] A. F. L. These locals had been certified as the representative of a majority of the employees in an appropriate bargaining unit on August 12, 1946. During the period September 19, 1947 to October 18, 1947, petitioner refused to bargain, basing such refusal

[1] Referred to hereafter as IBEW. Petitioner is referred to as the Company.

upon the expressed view of the Board's General Counsel that the officers of the American Federation of Labor[2] (with which the IBEW is affilated) must first file non-Communist affidavits. The Board subsequently repudiated this interpretation[3] and the Company agreed to resume collective bargaining. But once again, in early November of 1947, the Company refused to bargain—this time because the locals allegedly no longer represented a majority of the employees. A charge of unfair labor practice was then filed by the locals and a complaint was issued by the General Counsel on November 12.[4] Meanwhile, on November 8, the federation officers had filed the affidavits allegedly required of them by 9(h), 29 U. S. C. A. § 159(h). The officers of the locals and of the IBEW were in compliance at all times relevant to this proceeding.

I

This case involves the construction of the non-Communist affidavit provision, § 9(h), of the Labor Management Relations Act of 1947, 29 U. S. C. A. § 159(h). That section reads:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e)(1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and *the officers of any national or international labor organization of which it is an affiliate or constituent unit* that he is not a member of the Communist Party or affiliated

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[2] Referred to hereafter as AFL or federation.

[3] Matter of Northern Virginia Broadcasters, Inc., 75 N. L. R. B. 11 (1947).

[4] The complaint charged unfair labor practices within the meaning of 29 U. S. C. A. § 8(a)(1) and (5).

> with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. [Emphasis supplied.]

The Board held that the key phrase—"national or international labor organization"—does not ordinarily include the American Federation of Labor,[5] relying upon its prior decision in the *Northern Virginia Broadcasters* case.[6] That decision was based on (1) the federation's lack of participation in the collective bargaining process, (2) the policy of § 9(h), and (3) the technical meaning of "national or international labor organization" as referring the national and international unions which are the autonomous members of the federation.

The Supreme Court has admonished us many times to give "great weight" to an agency's interpretation of its governing statute, especially where the legislative intent is ambiguous.[7] Such deference keeps the inexpertness of courts, which must deal with the whole gamut of the law, from distorting the policy of Congress in complex areas of the economy requiring specialized skills and scrutiny. It minimizes the danger that lay constructions will be given to words which are terms of art to those schooled in their special fields. The Board has drawn its conclusion that the federation is not a "national or international labor organization" from its familiarity with the terminology

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[5] This decision is qualified by another Board ruling, to the effect that when the federation occupies a position in relation to one of its component parts similar to that of a national or international and its local, the federation officers must comply with § 9(h). A federation finds itself in such a position in its relations with an "organizing committee" which is directly chartered and supervised by it. *Matter of American Optical Co.*, 81 N. L. R. B. 453 (1949).

[6] *Supra*, note 3.

[7] See, e. g., *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940); *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315 (1933) ("[Administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new").

and the practices of the labor field. We think such a construction is consistent with both the history and the policy of 9(h). The Joint Committee on Labor-Management Relations—appointed by Congress to report upon the functioning of the new Act—appears to have been of like mind. In its annual report, the Committee analysed the Board's early decisions under the Act, specifically summarizing the Board's holding that federation officers were not ordinarily required to file affidavits. Although a number of criticisms and suggestions were made by the Committee, no objections were raised to the Board's construction of 9(h).[8]

The most authoritative discussion of 9(h) is found in the Supreme Court's recent decision in *American Communications Assn. v. Douds*, 339 U. S. 382 (1950). It was held therein that the constitutional justification for a non-Communist affidavit lay in its function as a deterrent to political strikes which might seriously burden interstate commerce. The emphasis throughout the opinion was that 9(h) was aimed at those who control the collective bargaining process and hence are in a position to call political strikes. Thus, Mr. Chief Justice Vinson, speaking for the Court, pointed out that Communists might carry their revolutionary objectives "into their conduct of union affairs by calling political strikes";[9] that their beliefs "strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activities."[10] It was expected, said Mr. Justice Jackson, concurring in part and dissenting in part, that when the Communist affilation of union officers was called to the attention of the union membership, it would no longer

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[8] The Board decision in the *Matter of Northern Virginia Broadcasters, Inc., supra* note 3, is summarized in the Report of Joint Committee on Labor Management Relations, *Labor-Management Relations*, Sen. Rep. No. 986, 80th Cong., 2d Sess., Pt. 1, p. 11; Pt. 3, pp. 36-37 (1948). See treatment of Committee approval of administrative construction as an expression of congressional acceptance in *Herzog v. Parsons*, 181 F. 2d 781, 788 (U. S. App. D. C. 1950). It is worthy of some note that Senator Taft, one of the principal sponsors of the bill, said that the Board's decision was " 'certainly not in conflict with the intention of Congress' (New York Times, Oct. 8, 1947, p. 6)." Board's Brief, p. 22 n. 11.

[9] 339 U. S. at 407.

[10] *Ibid.*

"entrust its bargaining power, its records, and its treasury to such [Communist] hands. When it does * * * [i]ts officers cease to be interested in correcting grievances but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive."[11] To prevent such a distortion of the Act's overriding purpose—which is the promotion of peaceful collective bargaining—Congress could "protect a labor union from Communist Party domination * * * [just as] from employer domination."[12]

Analysis of the functions performed by the various entities involved here makes it clear that it is the locals and their parent nationals or internationals who call strikes and who participate in the collective bargaining process.[13] It is the officers of these organizations who are amenable to the pressure of the union membership via the election machinery.[14] In contrast, neither the federation nor its officers, as such, have authority to call strikes; they do

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[11] *Id.* at 431.

[12] *Id.* at 433. Mr. Justice Frankfurter separately stated the problem as whether or not Congress could "keep Communists out of controlling positions in labor unions as a condition to utilizing the opportunities afforded by the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947." *Id.* at 416. He concluded that it was permissible for Congress to decide that "trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act * * *." *Id.* at 418.

[13] According to the Board's brief, p. 16:

> "Article XVII, Section 7 of the Constitution of the International Brotherhood of Electrical Workers (1947 ed.), the International union with which the charging party before the Board in these proceedings is affiliated, provides that all agreements made by a local union must be approved by the International's President, and that if necessary he may make such corrections as are required to conform to the International's policy. The control thus vested in the International extends as well to any by-law or rule of the local, or jurisdictional controversy to which the local may be a party. Article IX, Sections 6 and 7, empowers the International's Executive Council to suspend or revoke the local's charter, or to take charge of its affairs when it is deemed 'necessary to protect or advance the interests of its members and the IBEW;' and Article XVII, Section 13, requires that strikes may be called by a local only after approval by the International's president."

[14] See Mr. Justice Black's dissenting opinion in the *American Communications Assn.* case, where he describes 9(h) as a law which coerces "union members not to elect any Communist as an officer." 339 U. S. at 450.

not participate in collective bargaining and have no individual members who can subject them to the pressure of the ballot, for their only members are unions.[15] The position of the federation is not markedly different from that of a trade association made up of individual employers. Like the latter, it seeks to coördinate policy, provide encouragement, and perform certain staff functions such as research and publicity. Like the latter, it can hardly be described as a participant in or as in control of the collective bargaining process. This view is strongly supported by the Board's conclusion, drawn from the writings of labor economists, that the phrase in question has a distinct technical meaning which does not include federations. As one writer describes it, the national or international unions "are powerful, sovereign bodies, creating locals by charter at will, and revoking them likewise, reserving the power to suspend or otherwise discipline locals, calling strikes, and bargaining. *They are the independent groups of which the American Federation of Labor is but a confederation or alliance.*"[16] [Emphasis supplied.]

The definition of labor organization, which is the same in the new as in the old Act, reflects this concern with col-

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[15] The objectives of the American Federation of Labor, as stated in Article II of its Constitution, are primarily:

"Sec. 2. The establishment of National and International Trade Unions, based upon a strict recognition of the autonomy of each trade, and the promotion and advancement of such bodies.

* * * * *

"Sec. 4. An American Federation of all National and International Trade Unions, to aid and assist each other; to aid and encourage the sale of union label goods, and to secure legislation in the interest of the working people, and influence public opinion, by peaceful and legal methods, in favor of organized labor."

But see note 5, *supra.*

[16] Taylor, *Labor Problems and Labor Law* 269-270 (1950). "The national unions are not members of the AFL or CIO in the sense that Minnesota is a part of the United States. Their position is similar to that of individual countries within the United Nations. The AFL or CIO executive council corresponds roughly to the United Nations Security Council. Each major union has a veto power and can prevent any action adverse to its interests. It is a serious problem for the labor federations, as it is for the United Nations to find useful activities which will not break up the organization by causing internal strife among the members." Reynolds, *Labor Economics and Labor Relations* 143 (1949). See also Peterson, *American Labor Unions* 41-42 (1945).

lective bargaining and the organizations involved therein. It reads:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. [29 U. S. C. A. § 152(5)]

As we have already indicated, employees do not participate in the federation, its only members being unions. Nor does the federation deal "with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." All such functions are performed by the national or international unions and their locals, except in the rare instances when the federation itself is functionally classed as a national or international.[17]

Two other factors tend to support our view that federations are not within 9(h). First, the House bill which was the forerunner of 9(h) forbade certification of any labor organization as a collective bargaining representative "if one or more of its national or international officers" were Communists.[18] The words italicized by us would seem to indicate that the bill was aimed at the local union and at "its national or international officers"—not at the federation of which a national or international union is a virtually autonomous part.[19] This language remained in the

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[17] See note 5, *supra*.

[18] Section 9(f)(6) of H. R. 3020, 80th Cong., 1st Sess., read, in pertinent part, "No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party * * *." 1 *Legislative History of the Labor Management Relations Act, 1947*, p. 63 (1948).

[19] House Report No. 245 on H. R. 3020 refers to the fact that "At least *11 great national unions* and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions." *Id.* at 329. [Emphasis supplied.] There are only *two* federations of importance, the A. F. L. and C. I. O.

bill as it first passed both House and Senate[20] and was changed to its present form only when the non-Communist requirement was recast so as to provide for affidavits. It does not appear that any change in meaning was intended by the substitution of "such national or international labor organization" for "its national or international officers." Second, in his veto message, the President said, "The mere refusal by a single individual to sign the required affidavit would prevent an *entire national labor union* from being certified * * *. *The union and the affected industry* would be disrupted for perhaps a long period of time * * *."[21] It seems to us that, had it been thought that 9(h) required federation officers to file, the President would undoubtedly have pointed out the calamitous effect on the entire economy of non-compliance by a single federation officer. Not one but many industries and many "national labor unions" would then be affected by his failure to file.[22]

All that we have said thus far reveals that Congress, the President and the Supreme Court apparently considered "national or international labor organization" to mean those organizations which directly perform the collective bargaining functions described in § 2(5).[23]

Petitioner argues that, even if it be conceded that the phrase "national or international labor *union*" does not include a federation, nevertheless Congress used a broader term—"national or international labor *organization*," and that such term includes a federation. Absent any support for such an assertion in the legislative history, we cannot agree. It seems more reasonable to us that "organization" was used instead of "union" merely because not all bodies popularly known as unions are such by name. They

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[20] *Id.* at 190, 250.

[21] *Id.* at 921. (Emphasis supplied.)

[22] The effect of non-compliance on the part of a single federation officer was stated by the Board to have been a factor in the congressional intent not to include federation officers within 9(h). *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. at 15.

[23] 29 U. S. C. A. § 152(5).

are variously labelled union, brotherhood, association, guild, alliance, board, plan, etc.

One other argument is pressed upon us. It is said that, since both § 9(h) and § 304[24] refer to "labor organizations"[25] and the Supreme Court has held that the C. I. O. is drawn within § 304, it follows that the A. F. L. is a "labor organization" within § 9(h). But the decision cited to us[26] contains neither holding, express or implied, nor discussion to the effect that the C. I. O. is a "labor organization" within § 304. The case was disposed of on grounds which made it unnecessary to consider that question.[27] Although we do not now concern ourselves with the construction of § 304, we recognize that the same words often do not mean the same thing in different contexts. A clear legislative history might require that federations, though not within 9(h), be included within § 304. So also, the fact that the policy and function of § 304 differ from that of 9(h) may require that it be given a different construction. Section 304, unlike the rest of the Labor Management Relations Act, is not keyed to collective bargaining but to political campaign contributions. It amends the Corrupt Practices Act rather than the National Labor Relations Act. It may be that the federation's status is not divisible in the performance of this political function, as it is with respect to the collective bargaining process around which 9(h) revolves; that the political activities of the federation on behalf of the locals and organizing committees directly chartered and supervised by it[28] cannot be separated from similar activities on behalf of its national and international member unions.

We are aware that our construction of 9(h) is in conflict with that of the Fifth Circuit in *National Labor Re-*

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[24] Section 304 is now part of 50 U. S. C. A. App. § 1509, which provides in pertinent part: "For the purposes of this section 'labor organization' shall have the same meaning as under the National Labor Relations Act [Title 29, § § 151-166]."

[25] Quoted on p. 5, *supra.*

[26] See *United States v. C. I. O.*, 335 U. S. 106 (1948).

[27] *Id.* at 110.

[28] See note 5, *supra.*

lations Board v. Postex Cotton Mills, No. 12888 (5 Cir., May 5, 1950).

II

Petitioner contends that, even if the federation officers were not required to file, it was entitled to rely on the General Counsel's unofficial intrepretation that such officers did have to file and, therefore, was justified in refusing to bargain with the locals. Aside from the fact that estoppel may not be invoked against the Government[29] and hence does not prevent the Board from overruling its General Counsel, we think there is another ground for decision on this point, although the Board does not rely upon it. Even if it were true that federation officers were required to file and had failed to do so, petitioner could not for that reason alone refuse to bargain. The failure of union officers to comply with 9(h) does not in any way relieve an employer of the paramount obligation to bargain collectively in good faith. The Act's only sanction for non-compliance is denial of Board facilities. Thus, if an unfair labor practice is committed by an employer, the union may not seek Board aid to compel him to cease and desist

> unless there is on file with the Board an affidavit executed *contemporaneously or within the preceding twelve-month period*[30]

by the officers covered. Since this language specifically contemplates that the requisite affidavits may be filed "*contemporaneously*" with invocation of Board facilities, the unfair practice against which they are invoked obviously must have occurred earlier. It is thus the Board which refuses its processes to the non-complying union, not the employer. We do not think an employer may take the matter into his own hands and refuse to bargain with a union because its officers have not filed. If he does so, the ability of the union to successfully invoke Board processes thereafter, so long as its officers file beforehand, may result in his being cited for an unfair labor practice.

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[29] *United States v. San Francisco*, 310 U. S. 16, 31-32 (1940).

[30] 29 U. S. C. A. § 159(h), quoted in full, *supra*, p. 2. [Emphasis supplied.]

Unlike the phrase "national or international labor organization," we think the language of the statute is clear on this point. It is neither ambiguous nor a term of art depending upon technical sources for its meaning. We disagree with the contrary position taken by the Board in *Matter of Andrews.*[31]

III

The Company seeks to argue that, even assuming federation officers were not required to file, it was under no obligation to bargain with the Union on September 19, 1947, because the Union did not represent a majority of the employees at that time. That point was not argued before the Board and cannot be raised for the first time here.[32] It is true that petitioner took exception to the Trial Examiner's finding of fact

> * * * that on September 19, and November 8, 1947, and at all times thereafter the Union represented a majority of the employees in the appropriate unit, and was still the statutory bargaining agent for the employees therein.

But such exception was taken

> for the reasons more fully set forth in Respondent's Brief under B. P.-1-2-3-5-6-7, 9.

None of the "reasons" thus incorporated by reference dealt with the question of majority status on September 19. Whatever reference was made to majority status was to the situation on November 8.

IV

Since petitioner committed an unfair labor practice by failing to bargain with the Union on September 19, 1947, any loss of majority subsequent to that date is attributable to the illegal refusal to bargain. Petitioner may not rely upon a loss of majority attributable to an unfair labor

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[31] 87 N. L. R. B. No. 62.

[32] 29 U. S. C. A. § 160(e); *National Labor Relations Board v. Cheney California Lumber Co.*, 327 U. S. 385, 388-389 (1946).

practice as a defense for his refusal to bargain on November 8, 1947.[33]

The order of the Board is affirmed and will be enforced. So ordered.

WILBUR K. MILLER, Circuit Judge, *dissents.*

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[33] *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 704-705 (1944); *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 687 (1944); *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 513 (1942).

APPENDIX 3

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 12,888

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

POSTEX COTTON MILLS, INC.,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

(May 5, 1950.)

Before HOLMES, WALLER, and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: The respondent urges the point, presented by motion to dismiss before the trial examiner, and presented and re-urged before the National Labor Relations Board and in this Court, that the Board was forbidden by the statute[1] to complain of the charge

[1] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or with-

(Footnote 1 continued on next page.)

made by the Textile Workers Union of America, C. I. O., that respondent refused to bargain with it. The question, as well stated in the Board's brief is: "Whether the Board is authorized to issue a complaint upon a charge filed by an international (union) affiliated with the Congress of Industrial Organizations if the officers of the international have filed the non-communist affidavit provided for in section 9(h) of the Act, but the officers of the C. I. O. have not."

No question of the constitutionality of the statutory requirement is raised. We therefore do not consider Congressional power, but only the proper construction of the statutory language. There is no dispute between the parties as to Congressional purpose. It is conceded that the evil of Communist influence upon labor organizations was sought to be remedied by denying the benefits provided by the Act, and especially collective bargaining, to unions having Communist officers. That Congress was properly concerned over the seriousness of industrial strife and disunity threatened and which would result from politically motivated strikes of Communist-led unions may not be doubted. In our efforts to give effect to Congressional purpose, we should not overlook what we consider the amply justified and validly sustained view of substantially the entire membership of the Congress (as is likewise true of all loyal Americans generally), that since Communist idealogy has been shown so flagrantly incompatible with the principles of American democracy that both can not coexist in any one system of government, its destructive influence in all phases of government should properly be removed if lawful means be available.

(Footnote 1 continued from preceding page.)

in the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect of such affidavits." Sec. 9(h), Labor Management Relations Act, 61 Stat. 146, 29 U. S. C. A. Sec. 159(h).

The charge in the present case was made by the Textile Workers Union whose officers had filed the necessary affidavits. At the hearing it was stipulated, "that the Congress of Industrial Organization is a labor organization," and that its President had not filed the affidavit required by No. 9(h), *supra*. It being established for the record, as is also a matter of general knowledge, that the Congress of Industrial Organizations is a labor organization, the question remaining to be settled, is whether it is likewise "any national or international labor organization" within the terms of the statute.

The Board contends that consideration of the well established meaning in labor relations parlance of the words "national or international labor organization" as not including the present federations, and of the autonomous, independent nature of the national and international unions, by which the parent organization is only a federation or alliance, with resultant lack of control by the federations over its affiliates, and that the federation does not generally directly bargain with employers, and of the legislative history of the Act, establishes that Congress did not intend to, nor bring the C. I. O. within the requirements of the noncommunist provision. It further contends that its construction of the statute fully effectuates the Congressional intent to prevent Communist-led unions from subverting the statutory policy of encouraging collective bargaining, and the contrary construction tends to frustrate that purpose, since, as urged, if the failure of one officer of the C. I. O. to file the affidavit barred each of its affiliates or constituent units from invoking the jurisdiction of the Board there would be no incentive for such affiliate to purge its own ranks. The Board (with one member concurring for distinct reasons, and another dissenting), held, as to the American Federation of Labor, that it was not within the terms of the statute where the national union affiliated with it seeking relief, was in compliance. *North Virginia Broadcasters*, 75 N. L. R. B., 11. We recognize the Board's opportunity of familiarity with the usual meaning of terms employed in labor relations parlance, but we do not approve its construction of

the provisions of the legislative enactment. We think the language of the statute, considered in the light of Congressional purpose, the evil to be remedied, and the means provided to effectuate that purpose, evidences Congressional intent to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.

The force of the Board's argument that national and international unions are generally considered to have a status different from the parent organizations, sought to be supported by quotations from recognized authorities in the field of labor economics, is considerably weakened by the observation that these writers refer to the relationship of national and international *unions* to the American Federation of Labor or the Congress of Industrial Organizations, not to national or international *organizations*, as does the statute. Nor do we think the question of the relative strength or contrasting power of the union and the parent organization controlling. [If the position of the union desiring the benefit of the Act is strong, it can with other affiliates exercise control over the parent; if weak, the parent can exercise control over it.] Thus in either event, effectuation of the Congressional purpose to eradicate Communist leadership is not thwarted, but promoted, in requiring compliance by each. But if extent of control be material, we are cited by the Board to instances where strong national and international unions withdrew from their parent organizations and presently function successfully independently of the federations. Congress was doubtless aware of these instances and may well have been of the opinion that in view of the desire of any federation to grow in members and power, the realities of the situation would require the parent to bring itself into compliance rather than lose its strong affiliates. It is said that the leaders of the two major organizations are determined to rid their organizations of Communist influences. We make no inquiry of and are not legally concerned with the purpose of the officers of the two major federations in declining to file the required

affidavits. However, if the statute had been enforced as we here hold proper, and one had complied and another had not, we doubt not there would have resulted such acquisition of new affiliates by the complying organization as would have proven the validity of the means adopted by Congress to remove Communist influence from the American labor movement. [Furthermore, without regard to relative power, the parents themselves in instances so numerous as to be substantial, directly charter and control local unions. Clearly Congress did not intend to require compliance in such instances where the parent organization bargained directly but not where it was indirectly engaged through the full support accorded an affiliated national or international union. The Board takes a contrary view, and as a result the parent is held sometimes subject and sometimes not, to the provisions of the statute. Compare *North Virginia Broadcasters, supra*, and *American Optical Co.*, 81 N. L. R. B., 453. The statutory terms may not be properly defined upon the basis of the capacity in which the labor organization acts in a particular instance.]

The Act contains its own definition of a "labor organization." Section 2(5) [29 U. S. C. A. No. 152(5)] provides: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." To determine that the C. I. O. does not come within the terms of the statute would require us to overlook the realities and substance of its objectives and operations. It is a matter of general knowledge that the parent organization does frequently materially support its affiliates by financial aid and otherwise in their efforts of collective bargaining. The Constitution of the Congress of Industrial Organizations (Articles II and III) declares that:

"The objects of the organization are:

"First. To bring about the effective organiza-

tion of the working man and woman of America regardless of race, creed, color or nationality, and to unite them for common action into labor unions for their mutual aid and protection.

"Second. To extend the benefits of collective bargaining and to secure for the workers means to establish peaceful relations with their employers, by forming labor unions capable of dealing with modern aggregates of industry and finance.

"Third. To maintain determined adherence to obligations and responsibilities under collective bargaining and wage agreements."

* * * * *

"Section 1. The Organization shall be composed of Affiliated national and international unions, organizing committees, local industrial unions and industrial councils."

* * * * *

"Section 3. Certificates of affiliation shall be issued to local industrial unions by the Executive Board. The Executive Board shall issue rules governing the conduct, activities, affairs, and the suspension and explusion of local industrial unions * * *."

The Supreme Court in *C. I. O. v. McAdory*, 325 U. S. 472, 475 (1945), stated that "Petitioners are the Congress of *Industrial Organizations, a national labor organization*, and certain affiliated labor organizations * * *." (Emphasis supplied.) Another example of similar judicial reference is found in *A. F. of L. v. Watson*, 327 U. S. 582, 586 (1946). See also, *United States v. C. I. O.*, 335 U. S. 106, and *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450.

The affidavit required by the provisions of No. 9(h), *supra*, is referred to in common parlance generally as the "non-communist affidavit." But it should be observed that the statute is not so restricted. Beyond the "Communist party" provision, it extends to require further sworn state-

ment, that the affiant "does not believe in, and is not a member or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any unconstitutional methods." Whether this provision might be also considered as a legislative construction of the beliefs of the members of the Communist party, is not pertinent here. The provision is pertinent though, as illustrative that No. 9(h) evidences no novelty in expression of congressional intent to prevent any governmental department from being used, directly or indirectly, to promote or sustain any organization or person who believes in the overthrow of the government of the United States by any unconstitutional means. For illustration, in the Act of June 28, 1941, making appropriations for the federal judiciary (together with other departments and brances therein specified) for the ensuing fiscal year (55 Stat. 265, 303, No. 504), and in similar Acts for each year thereafter,[2] Congress prohibited the use of any of the funds appropriated "to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the government of the United States by force or violence; provided that for the purposes hereof an affidavit shall be considered *prima facie* evidence that the person making the affidavit does not advocate, and is not a member of an organization that advocates the overthrow of the government of the United States by force or violence."[3] It is made a felony for any person within the prohibited classes to accept employment compensated from the appropriated funds. It is true that in application the similar provisions of the two Acts are not precisely analogous. One relates to those who are a part of the Government, and withholds the purse from those the statute defines. The other imposes a restric-

[2] 56 Stat. 468, 507, No. 504; 57 Stat. 230, 244, No. 302; 58 Stat. 334, 358, No. 301; 59 Stat. 169, 201, No. 601; 60 Stat. 466, 480, No. 501; 61 Stat. 279, 306, No. 501; 62 Stat. 305, 333, No. 501.

[3] It is a matter of common knowledge that in order to comply with the statutes the disbursing officers of the government sought the affidavits provided by the Act from each official and employee of the departments. We know that they were executed by District and Circuit Judges and it is a fair assumption by the Chief Justice and Justices of the Supreme Court as well.

tion upon an agency provided and maintained by the government, and directs that the benefits provided by the Act shall be withheld from those who do not comply. This difference in the status of those subject to and affected by the operation of the two enactments does not make inapt a comparison of the statutes since both clearly express the legislative purpose—indeed plain common sense—that the United States of America will not knowingly aid or nurture those pledged to its destruction.

Under the proper construction of the congressional language, the Congress of Industrial Organizations is a national labor organization within the terms of No. 9(h) of the Labor Management Relations Act, *supra*. It was stipulated in the hearing of this case that the requirement of the statute as we adjudge it, had not been met. The Board was therefore not empowered to issue the complaint against the respondent, and accordingly, there is no legal basis upon which to predicate the order now sought to be enforced. The order of the Board is therefore invalid, it may not be enforced, and should be set aside. It is so ordered.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Fifth Circuit.

APPENDIX 4

EXCERPTS FROM BOARD'S DECISION AND ORDER

In the Matter of Isaac Andrews, Sarah Andrews, Mary E. Andrews, Martha W. Andrews, A. J. R. Helmus, and H. O. Coddington, d/b/a Andrews Company and American Federation of Labor, Case No. 10-CA-201, 87 N. L. R. B. No. 62.

* * * * *

1. The Respondent excepts to the Trial Examiner's finding that its refusal to bargain with the Union constituted a violation of Section 8(a)(5) of the Act. This exception is based upon the Union's failure to comply with the filing requirements of Section 9(f), (g), and (h) of the Act at the time of its request for recognition. Absent this element of non-compliance, we would, like our dissenting colleagues, affirm the Trial Examiner's finding of the 8(a)(5) violation.[1] However, under the circumstances of this case, and for the reasons hereinafter stated, we believe that the 8(a)(5) allegations in the complaint must be dismissed.

Congress enacted the National Labor Relations Act in 1935 with the expressed intent to prevent industrial strife and promote industrial peace. It gained that objective by creating rights and privileges for employees and labor organizations and thus restoring equality of bargaining power between employers and employees. Among the privileges so created was the right of a labor organization to be the exclusive bargaining representative. As a necessary corollary of that privilege, Section 8(5) of the Act imposed a duty on the employer to bargain with such ex-

[1] As set forth in the Intermediate Report, on October 13, 1947, the Union organizer addressed a letter to the Respondent, stating that the Respondent's employees had designated the Union as their exclusive representative and requesting that the Respondent recognize and bargain with the Union. The Union, although duly designated by a majority of the employees in an appropriate unit, was not then in compliance. The Respondent did not answer the letter, but embarked instead on what we all find was a campaign of unfair labor practices. On November 7, 1947, the Union effected full compliance, but did not renew its request for recognition. Three days later, the Respondent, without consulting the Union, unilaterally put into effect a new bonus plan.

clusive agent of its employees. The obligation so imposed being exclusive, it exacted a negative duty to treat with no other union.[2] Thus, under the Wagner Act, an employer was required to bargain and if he refused, he did so at his peril.

After 12 years of experience under the Wagner Act, Congress amended that statute. In order to eliminate "certain practices by some labor organizations, their officers, and members" which "have the intent or the necessary effect of burdening or obstructing commerce," Congress imposed certain limitations on the Board's administrative functions and also on the statutory rights or privileges of labor organizations which failed to satisfy the filing requirements set forth in the Act in Section 9(f), (g), and (h).

9(f) reads:

> * * * No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under Section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10, unless * * *.[3]

9(g) reads:

> * * * No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless * * *.

Thus the Board, in dealing with a non-complying union, is forbidden to take the following steps: (a) it may not investigate a question concerning the representation of

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[2] *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 683; *NLRB v. Jones and Laughlin Corporation*, 301 U. S. 1, 44.

[3] Section 9(h), relating to filing affidavits, reads the same as Section 9(f) in this respect.

employees or certify the union as the statutory bargaining representative; (b) it may not entertain the organization's petition under Section 9(e)(1) for a union-shop election; and, finally, (c) it may not issue a complaint pursuant to a charge filed by the organization. Examination of this Section clearly shows that by its enactment, Congress was directing its legislative powers towards the rights and privileges of labor organizations as opposed to the rights and privileges of individual employees.[4] Section 9(f) was designed to curb undemocratic practices which existed in some labor organizations. By Section 9(h) Congress hoped to purge communists from the labor movement.[5] Unlike the Wagner Act, which gave unqualified protection to labor organizations, the Amended Act thus prescribes certain standards which Congress considered necessary in the public interest, peace, and welfare. To assert, as do our dissenting colleagues, that these standards should be met only when it becomes necessary for a labor organization to resort to the Board is, in our opinion, a perversion of legislative intent. While the Act's legislative history is not dispositive of legislative intent, we feel free to take judicial notice of the inherent threat that communism and other undemocratic doctrines and practices are to the labor movement in this country.

In the *Marshall and Bruce case;*[6] a majority of the Board stated:

> * * * We are convinced that Section 9(f), (g), and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also *embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing sections.*

---

[4] See *Augusta Chemical Company,* 83 NLRB No. 7, wherein the Board said that employees who have engaged in union activity in behalf of a non-complying union are still protected by the Act.

[5] 93 Cong. Rec. A 1099, 1100, 3955, 5291, A 3232.

[6] *Marshall and Bruce Company, 75 NLRB 90.* (Members Houston and Murdock dissenting.)

We feel bound by that decision. In that case, we decided that the employer was not obligated to bargain with a non-complying union. Consistency demands the same result in this case. Furthermore, were we to find that the Respondent had violated Section 8(a)(5) when the union was not in compliance, we would be utilizing the Board's processes to give an aura of respectability to all unions which have failed to comply. We believe that such a result would not effectuate the purposes of the Act.

Apart from public policy, however, we believe that the Act itself dictates a dismissal of the 8(a)(5) charge in this case. The exclusive representative principle is a statutory right unknown at common law. While Congress has not specifically withdrawn that right from non-complying unions, it has withdrawn from non-complying unions the only method of enforcing the right by forbidding the Board to issue a complaint. Thus, while under the Wagner Act the remedy was unlimited, under the amended Act it is limited by the filing provisions. As we are here dealing with a statute which creates an obligation and at the same time creates a remedy, a limitation on the remedy is to be treated as a limitation on the right itself.[7]

Nor do we believe that the Union's subsequent compliance cured the effects of its non-compliance which existed at the time of its request to bargain. The Act does not state, nor may it be implied, that the Board should give retroactive effect to the Union's compliance. Such an interpretation would permit the circumvention of these provisions, for a non-complying labor organization could compel recognition by the mere threat of subsequent compliance and the filing of a charge. Moreover, we would be giving the noncomplying union the very remedy which Congress specifically denied it. Furthermore, the fundamental purpose of the Act is to encourage and protect the practice and procedure of collective bargaining. Labor organizations which fail to meet the filing requirements

[7] *The Harrisburg*, 110 U. S. 199; *Davis v. Mills*, 194 U. S. 451; *Western Fuel Company v. Garcia*, 257 U. S. 233; *Central Vermont R. v. White*, 238 U. S. 507; *Adams v. Albany*, 80 F. Supp. 876, 880.

remove themselves from the protection of the Act and thus weaken their bargaining position. We do not believe that Congress intended the Board to extend retroactive protection to those organizations, which have thus thwarted an established public policy.

Our dissenting colleagues concede that Congress, by Section 9(f), (g), and (h), deprived non-complying unions of access to the Act and the remedies therein provided; however, they ignore the action of Congress and would supply the remedy in this case because the Respondent did not contemporaneously specify non-compliance as the basis for its refusal to bargain. In other words, what Congress has specifically denied to a non-complying union, our dissenting colleagues would supply on the basis of a waiver by the employer. The short and complete answer is that a waiver can never supply the missing statutory requirements. The respondent's good or bad faith is as completely immaterial to the issue as in a case where the employer fails to specify lack of majority as the ground of its refusal to bargain with a union which in fact lacked a majority at that time. Would our dissenting colleagues consider such contemporaneous failure to specify lack of majority as tantamount to the existence of a majority? Obviously, not!

Accordingly, we find that the Respondent was not legally obligated to bargain with the Union while it was not in compliance with the provisions of Section 9(f), (g), and (h). Likewise, we find that the November 5 unilateral offer of a wage increase did not constitute a violation of Section 8(a)(5) as there was no exclusive representative then in existence which the Respondent was obligated to recognize.

PAUL M. HERZOG, CHAIRMAN, and JOHN M. HOUSTON, MEMBER, dissenting in part:

We join in the decision to the extent that it finds a violation of 8(a)(1) and (3). But we would find also that the Respondent unlawfully refused to bargain.

Our colleagues dismiss this portion of the case despite the fact that the union came into compliance within a month after the refusal to bargain and despite the fact that the Respondent, at the time it refused to bargain, *did not* assign as its excuse the non-compliance status of the union. Its refusal was based on a broad rejection of the collective bargaining principle. Indeed, it was not until it filed exceptions to the Intermediate Report in 1949, more than 16 months after its refusal to bargain, that the Respondent first raised the question of the Union's non-compliance status. Significantly, the Respondent dealt unilaterally with its employees on wages in November 1947, *after* the Union came into compliance, at a time when no excuse for evasion of its collective bargaining obligation existed.

In our view, the policy of Congress which Section 9(f), (g), and (h) was designed to effectuate could be better fulfilled by finding a refusal to bargain in such circumstances, absent a showing that a respondent in good faith refused to bargain *on the contemporaneously stated ground* that a union was not in compliance at the time. Such a result would protect employers legitimately seeking to act in furtherance of an important objective of the Act, by calling their employees' attention to the non-compliance status of their representative. It would furnish an incentive to employees to require their representatives to comply, because by so doing they could achieve immediate recognition and bargaining, if necessary with the assistance of Board processes which they could then invoke. It would deprive employers, such as the Respondent here, of a cloak behind which to commit unfair labor practices with impunity without troubling to inform their employees of

the non-compliance status of their representative. All these desirable objectives are aborted by our colleagues' decision today.

We believe that the requirements of Section 9(f), (g), and (h), that "no complaint shall issue" in behalf of a non-complying union, are clearly procedural and were so intended by the Congress. They deprive non-complying unions of a remedy; they do not provide employers who violate the Act with perpetual immunity.[9]

[9] The majority appears concerned that we are giving something to a union which has not complied with the filing requirements of the law. But all we would do is look, practically, at the situation to be remedied by our Order *now*. That amounts to ordering this employer to fulfill his obligation to bargain with a union which has met those requirements.

* * * * *

APPENDIX 5

STATUTES

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Supp. I, Sections 141, et seq.

"Sec. 2. When used in this Act—

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"Sec. 3

* * *

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and

over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

* * *

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

"Sec. 9.

* * *

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recog-

nized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendation with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * *

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

"Sec. 10.

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation

of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the pro-

ceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

* * *

Sec. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"Sec. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at

which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

* * *

Sec. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

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CHARLES ELMORE C

NO. 466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

WEST TEXAS UTILITIES COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET. AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERVENOR

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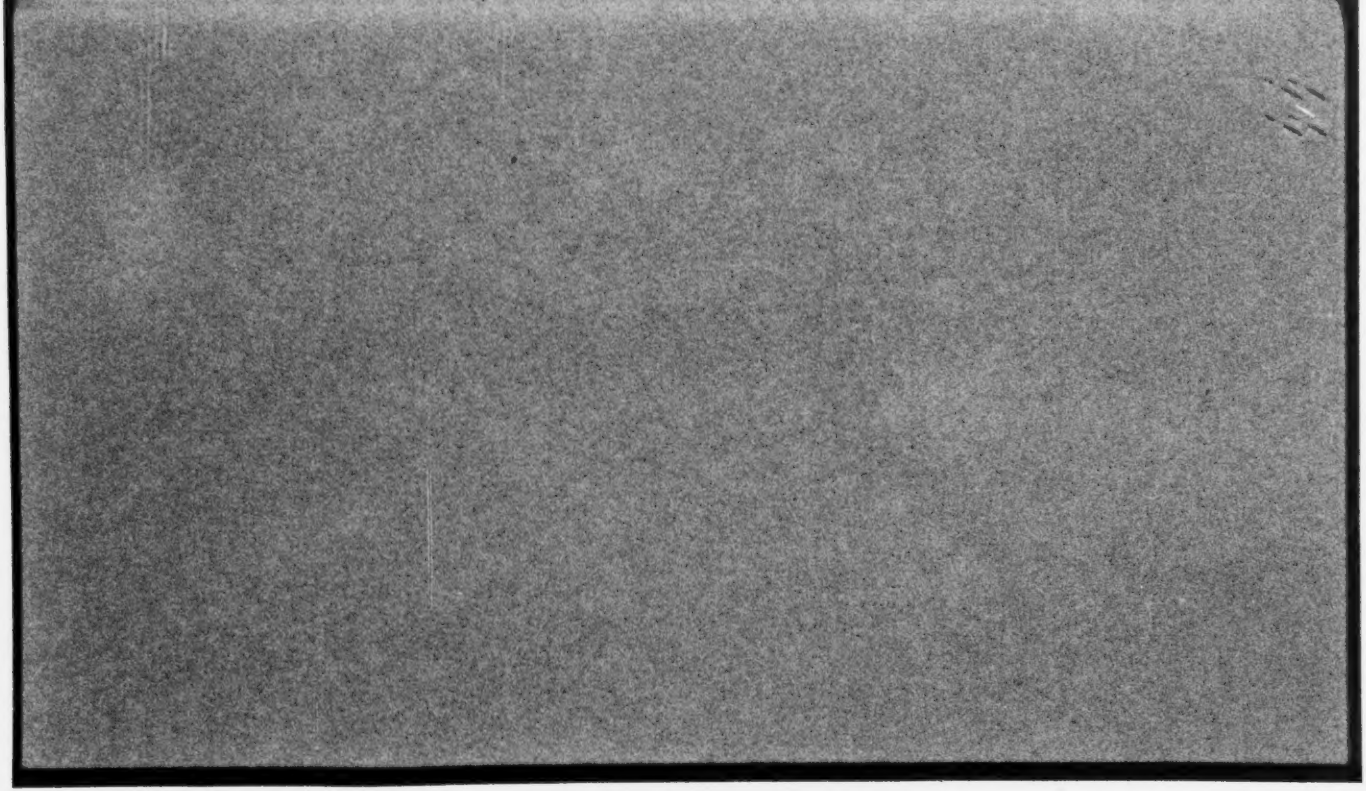

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BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERVENOR

The International Brotherhood of Electrical Workers (Local Unions Nos. 898, 920 and 1044), A. F. of L., the charging party in this case (hereinafter referred to as the IBEW), was granted leave to intervene in the court below by formal order of the United States Court of Appeals for the District of Columbia Circuit. Pursuant to such permission a brief was filed and oral argument presented.

It may be stated parenthetically that the IBEW was the first International Union affiliated with the American Federation of Labor to sign the non-communist affidavits at a time when there was considerable con-

troversy among the affiliates of the Federation as to whether the labor movement should refuse to sign the affidavits and abstain from utilization of the procedures of the National Labor Relations Board (Joint Appendix 125; See Proceedings of the American Federation of Labor Convention, October, 1947).

This brief in opposition to the grant of the petition for a writ of certiorari sought by the West Texas Utilities Company is limited to the issues arising out of the non-communist affidavit provisions of the Labor-Management Relations Act of 1947. It is respectfully submitted that these issues are the only matters presented by petitioner which raise a question under Rule 38 (5).

Intervenor believes that the principles relied upon by the Court of Appeals for the District of Columbia Circuit are correct and that the principles relied upon by the Courts of Appeals for the Fourth and Fifth Circuits are not in accordance with law. Argument is not presented in this brief in support of this view since the issue on the petition is to be determined under Rule 38(5) rather than on the merits.

Intervenor's opposition is based primarily on the point that although the decision of the Court of Appeals for the District of Columbia Circuit (*West Texas Utilities Company, Inc.*, v. *National Labor Relations Board*, 184 F, (2d) 233) conflicts with the decisions of the Courts of Appeals for the Fourth and Fifth Circuits (*National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 184 F. (2d) 98 and *National Labor Relations Board* v. *Postex Cotton Mills*, 181 F. (2d)

919) in the principles utilized by the respective courts, there is, however, an independent ground of decision in the instant case as to which there is no conflict.

In the *West Texas Utilities* case, *supra*, the officers of the American Federation of Labor filed all the documents prescribed by Sec. 9(f)(g) and (h) of the Act on November 7, 1947, seven months prior to the date of the issuance of the complaint (June 24, 1948) and a few days prior to the filing of the charge (November 12, 1947). In the *Highland Park* and *Postex* cases, *supra*, the officers of the Congress of Industrial Organizations, the parent federation in these latter cases, had not filed the prescribed documents before the complaints issued.

The court below ruled that Sec. 9(h) of the Act provides that if an unfair labor practice is committed by an employer, such as the refusal to bargain in this case, the union may not seek Board aid to compel him to cease and desist "unless there is on file with the Board their affidavits executed *contemporaneously or within the preceding twelve month period* (29 USCA, Sec. 159(h))" by the officers covered. The Court established as an independent ground of decision the clear and unambiguous language of the statute which permits the union to utilize the facilities of the Board if it files the affidavits *contemporaneously* with the institution of the proceeding (Pet. br. 40-41). Here, compliance was effected, even under the rule in *Highland Park*, seven months prior to the issuance of the complaint.

The decision in the instant case can thus stand even

if this Court were to affirm the ruling of the Court of Appeals for the Fourth Circuit. Accordingly, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be denied unless a case is made out for the exercise of the discretionary authority of this Court on grounds other than a direct conflict in the decisions of the respective Courts of Appeals.

It is our contention that petitioner's brief does not make out such a case under the considerations outlined in Rule 38(5).

Petitioner's contentions that the court below should not have considered the issue of the proper time for filing the prescribed documents because it was raised for the first time by the intervenor in the court below and because the fact of compliance by the American Federation of Labor on November 7, 1947, was not established in the record of the proceeding before the trial examiner, are procedural, and do not raise questions of general importance or substance. Indeed, even if the issue on this petition for a writ of certiorari is whether the court below erred in these respects, we believe that the action of the court below in ruling on this point was entirely proper.

Both the trial examiner and the Board ruled there had been a refusal to bargain. On the basis of the prior ruling of the Board in *Northern Virginia Broadcasters* and *IBEW Local 1215*, 75 NLRB 11, there was, therefore, no need or occasion for the intervenor to raise this point until the case had reached the Court. The intervenor then raised the question on the basis of

the ordinary rule in appellate proceedings that respondent has the right to urge any argument in support of the ruling in his favor, including contentions not passed on by the deciding body below (see *Langnes* v. *Green*, 282 U. S. 531). The fact of compliance by the American Federation of Labor was called to the attention of the court below in an appendix to the brief of the intervenor which is also set forth as an appendix to this brief (Appendix A). This is a matter of official record which this Court may notice. It has also been called to the attention of this Court in the petition for a writ of certiorari filed by the Solicitor General on behalf of the National Labor Relations Board in *National Labor Relations Board* v. *Highland Park Manufacturing Co.* (Petition in Docket No. 425, October Term, 1950, at p. 7 fn. 4).

Petitioner also argues that the ruling of the court below holding that affidavits can be filed contemporaneously with the institution of unfair labor practice proceedings before the National Labor Relations Board would serve to destroy the effectiveness of the non-communist affidavit provisions of the Act. The Act has been in effect for more than three and a half years. Nevertheless, petitioner does not cite a single actual case of the situation it contemplates, i.e., where a communist dominated union seeks bargaining rights, is refused such rights by the employer because of non-compliance by the union and thereafter the union changes its elected officers and files an unfair labor practice proceeding before the Board. The concern voiced by peti-

tioner is anticipatory rather than factual. This Court has granted petitions for the writ where actual difficulties have developed on a broad scale in the administration of a statute which can be resolved by its decision. Here it is asked to grant the petition on a showing of anticipated difficulty.

We contend, moreover, that petitioner's illustration is not a sound basis for inferring that the congressional intent will be defeated by the procedural rule established by the court below. The central point of the method chosen by Congress to rid the unions of communism was the establishment of an incentive for union members to replace communist officers through limitation of National Labor Relations Board processes to unions headed by officers who have complied with the non-communist affidavit provisions of the Act. If the actual occurrence of an employer unfair labor practice is irremediable by a substitution of legitimate officers for communist officers, under the procedural rule proposed by petitioner, the practical incentive for union members to make the change is less than the incentive provided by the general lesson of limitation of Board processes in cases of future employer unfair labor practices which may or may not occur.

It is respectfully submitted that petitioner's reasoning is actually based on the assumption that the replacement of officers in the illustration would not accomplish a bona fide change in the character of the union. This assumption is *contra*, however, to the fundamental basis of the method chosen by Congress.

There is another point which we believe should be called to the attention of this Court even though it is not discussed in petitioner's brief. There is a considerable degree of difference among the members of the National Labor Relations Board on the question of when the prescribed documents must be filed and some variation in their rulings on the point, *Andrews*, *supra*, and *New Jersey Carpet Mills, Inc.*, 92 NLRB No. 22, 27 LRRM 1114 (December, 1950).

We contend that this condition existing within the National Labor Relations Board does not raise the issue to such a level of importance as would serve to save the petition for a writ of certiorari from being denied.

Even if there were a direct conflict between the decision of the Court of Appeals for the District of Columbia Circuit and the decisions of the National Labor Relations Board, the case would not merit the granting of the writ of certiorari. It is obvious that the National Labor Relations Board, although an important administrative agency of the Executive Department, does not have the status of a court of appeals so as to bring this matter within the rule that conflicts between decisions of the United States Circuit Courts of Appeals are appropriate subjects for review by this Court. Nor is this a case where the decision of the court below is in conflict with a well established construction given a statute by administrative agents charged with its enforcement (cf. *Patterson* v. *Lamb*, 329 U. S. 539). The decision of the Board in the *Andrews* case, 87 NLRB No. 62, was rendered on December 6, 1949, by a divided

Board of three to two. No reference will be found in the majority decision of the Board in *Andrews* to that part of the language of the statute which the court below deemed to be so clear and unambiguous that it required the interpretation, as a matter of law, that the affidavits may be filed contemporaneously with the issuance of the complaint. There are three different positions stated by members of the Board in its decision in *New Jersey Carpet Mills, Inc., supra.* No effort was made by the dissenting members in this case to analyze the statutory language relied upon by the court below.

Furthermore, insofar as the importance of the issue is concerned, it should be noted that the National Labor Relations Board has stated in its petition for a writ of certiorari in the *Highland Park* case that in the fourteen cases now pending before the courts of appeals on the non-communist affidavit question, "The Board's complaint issued at a time when the parent federation of which the charging union was an affiliate, had not complied with the filing requirements in Sec. 9 (f) (g) and (h)." (Petition in Docket No. 425, October Term, 1950, p. 8.) There are apparently twenty other cases which have been referred to the General Counsel of the Board with instructions to seek enforcement and these are described as "similar" to the cases now pending in the courts of appeals. Therefore, it appears, on the basis of the information available to the intervenor through the representations made to this Court by the Board, that the independent ground of decision relied upon in his brief in opposition is not involved in any

of the cases which are now pending in the courts of appeals and is probably not involved in any of the cases in which orders have been entered by the Board but have not yet reached the courts.

The fact is, moreover, that the *Andrews* decision was reversed by the Board on the basis of the decision of the court below in *West Texas Utilities Company* and only one member of the board has expressed the view that the proper rule on the question of the time when compliance must be effected will vary, depending upon whether the employer advises the union at the time he refuses to bargain that his reason for such refusal is its non-compliance with the filing requirements of the Act. This view, which was not required by the facts presented in the *New Jersey Carpet Mills* case (27 LRRM 1119 fn. 20) is referred to as a "hypothetical situation" by the two other members of the majority (27 LRRM 1119) and as an "immaterial" consideration by the two dissenting members. In any event, the expression of this view by a Board member does not establish a direct conflict between the decision of the Board in *New Jersey Carpet Mills, supra*, and the decision of the Court of Appeals for the District of Columbia in *West Texas Utilities Co., supra*. Even if the Board were to be treated as having the status of a Court of Appeals for this purpose, the petition for a writ of certiorari should be denied if it is based on an alleged conflict of the principles utilized by the court below and the Board in reaching their respective decisions in *West Texas Utilities Co., supra*, and in *New Jersey Carpet Mills, supra*,

which are not in conflict. It is an *a fortiori* proposition that the petition for a writ of certiorari should be denied if the consideration of the case by this Court would serve only to resolve the conflict of principles utilized by the members of the Board in arriving at their conclusions on the matter of law which has been decided in explicit terms by the court below.

In addition to the above considerations, we believe we should bring to the attention of the Court certain factual distinctions in the three cases which have been ruled on by the United States Circuit Courts of Appeals, on the major issue of whether the officers of a parent federation are required to file non-communist affidavits in order to establish the eligibility of otherwise complying internationals and local unions who are affiliated with such federation.

The Courts of Appeals for the Fourth and Fifth Circuits had before them the constitution of the Congress of Industrial Organizations when they decided the status of that federation (Pet. br. 47-48). The Court of Appeals for the District of Columbia Circuit had the constitution of the American Federation of Labor before it when it ruled on the point (Pet. br. 36 fn. 15). These constitutions differ.

Furthermore, in the *Postex* case, *supra*, the Court noted that a stipulation had been made at the hearing that the CIO is a "labor organization" (Pet. br. 45) and serious weight was given by the Court to this stipulation in its decision that the statutory requirements had not been met (Pet. br. 50). The Court of Appeals

for the Fourth Circuit assumed that the question presented by the *Highland Park* case was identical with that before the Court of Appeals for the Fifth Circuit although no reference is made in the opinion of the Court of Appeals for the Fourth Circuit as to whether any such stipulation was entered into (Pet. br. 23). In the instant case there was no stipulation as to the status of the American Federation of Labor and the Court determined that the activities of the American Federation of Labor did not fall within the statutory definition of the key term "labor organization" (Pet. br. 36-37).

The intervenor also wishes to point out that since it is in the position of a respondent it believes that it may, under the rule of *Langnes* v. *Green*, *supra*, advance argument in support of the judgment below even though the contention was not passed upon by the court below. It is respectfully submitted that the employer has no litigable interest in the question of whether a union is eligible for service by the National Labor Relations Board. *Perkins* v. *Lukens Steel Company*, 310 U. S. 113; and see *Stark* v. *Wickard*, 321 U. S. 288. The Congress intended that the filing requirements of the Act would establish a protection of the public safeguarded by the executive action of the Board and by criminal proceedings applicable to the makers of false affidavits. The statutory language employed by the Congress does not admit of the view that the Congress intended the issue of compliance to be available for litigation by the employer in an unfair labor practice proceeding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

LOUIS SHERMAN,
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Washington 5, D. C.,
Attorneys for Intervenor.

January, 1951.

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.
May 1, 1950

Mr. George Meany, Secretary-Treasurer,
American Federation of Labor,
901 Massachusetts Avenue,
Washington 1, D. C.

DEAR MR. MEANY:

This is to advise that the records in this office indicate the American Federation of Labor gained initial compliance with the filing requirements of Section 9(f) (g) and (h) of the Labor Management Relations Act, 1947, on November 7, 1947. You are further advised the National Labor Relations Board was not issuing letters of compliance at that time.

Very truly yours,

/s/ CLAUDE B. CALKIN,
Affidavit Compliance Officer.

FEB 20 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 466

WEST TEXAS UTILITIES COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR PETITIONER, WEST TEXAS UTILITIES COMPANY, INC.

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REPLY MEMORANDUM FOR PETITIONER, WEST TEXAS UTILITIES COMPANY, INC.

In its Memorandum of response to the petition for a writ of certiorari, the National Labor Relations Board, herein called "the Board", concedes that the petition presents one issue of general importance in the administration of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151, et seq.), herein called "the Act", but suggests, nevertheless, that "this Court retain the present petition on [its] docket pending disposition of No. 425" (Memo., p. 13). In support of this suggestion the Board urges (1) that this case, unlike No. 425,

presents issues of statutory policy which should in the first instance be decided by the Board, and (2) that there are no other issues presented which warrant further review by this Court. Neither of these propositions is sound and both are based upon erroneous factual assumptions.

I

The first proposition urged by the Board in support of its suggestion for deferring action on this petition is that the Board has not yet "decided whether an employer violates the Act by refusing to bargain where, as here, the refusal is expressly based upon the contemporaneous noncompliance with Section 9(h) of a union which has later complied", nor "whether, if such a refusal violates the Act, the Board would deem a bargaining order appropriate to 'effectuate the policies of this Act' " (Memo., p. 8). Since these are questions of statutory policy, the Board suggests this case should be remanded to the Board for decision of these questions if it affirms the decision of the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *Highland Park Mfg. Co.*, No. 425, or dismissed if it reverses in No. 425.

This suggestion is without merit because it rests upon two erroneous factual assumptions. First, it assumes that the AFL came into compliance with Sec. 9(h) of the Act between September 19, 1947—the date of petitioner's admitted refusal to bargain with the Union—and June 24, 1948—the date upon which the complaint was issued, but the record in this case contains no evidence that such compliance was effected by the AFL during this period. The matter was never litigated because the Union and the Board at all times until the case reached the Court of Appeals contended only that the AFL is not required to comply with Sec. 9(h) at all. Only in the Court of Appeals did the Union, but not the Board, advance for the first time the contention that the AFL came into compliance after September 19, 1947 and was for that reason entitled to utilize the facilities of the Board. Moreover, if this Court is now

to go outside this record to determine the fact, petitioner will show that the affidavits alleged to have been filed by Messrs. Green and Meany on November 7, 1947, did not constitute compliance with the requirements of Sec. 9(h) and that they were the result of a scheme to circumvent the requirements of Sec. 9(h) whereby the AFL convention, without changing the duties of its officers, stripped from its Executive Council members their titles as Vice Presidents of the AFL. This action was frankly taken only because one of the Vice Presidents, John L. Lewis, refused to sign the Section 9(h) affidavit, thus preventing the AFL from effecting compliance.[1] We do not suggest that this Court

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[1] The "Report of the Proceedings of the Sixty-Sixth Convention of the American Federation of Labor held at San Francisco, California, October 6 to 16, inclusive 1947" published by direction of the American Federation of Labor, records the following:

"SUPPLEMENTAL REPORT OF THE EXECUTIVE COUNCIL

(Vice-Presidents)

"In order that affiliated federal labor unions of the American Federation of Labor may fully exercise their right to qualify or not to qualify under the Taft-Hartley Act without in any way interfering with the right of any individual officer of a national or international union to follow the policy of his own organization in this regard, the Council recommends the following changes in the Constitution of the American Federation of Labor:

"Section 1 of Article V, which now reads:

" 'The officers of the Federation shall consist of a President, 13 Vice Presidents, and a Secretary-Treasurer, to be elected by the convention on the last day of the session, unless otherwise determined by the convention, and these officers shall be the Executive Council.'

shall be changed to read as follows:

" 'The officers of the Federation shall consist of a President and a Secretary-Treasurer, to be elected by the convention on the last day of the session, unless otherwise determined by the convention.' "

* * *

"A new Section 1 shall be inserted at the beginning of Article IX to read as follows:

" 'There shall be constituted an Executive Council consisting of thirteen (13) members who shall be elected by the convention on the last day of the session unless otherwise determined by the con-

should now go outside the record to determine these unlitigated questions. Rather we urge that since the matter was never litigated, the Court of Appeals erred in undertaking to decide the question when raised for the first time there by the intervenor Union.

The Board's second erroneous assumption of fact is that the Board has not decided the so-called question of statu-

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vention. These thirteen (13) members of the Executive Council shall be designated and elected as the First Executive Council Member, the Second Executive Council Member and so forth.'"

* * *

"As stated in the report, the purpose of this proposed change in the constitution is to increase the freedom of decision of federal local unions with reference to their actions and policies concerning requirements of the Taft-Hartley Law. If adopted this Constitutional revision would establish the President and Secretary-Treasurer of the American Federation of Labor as the only 'officers' of the Federation within the meaning of the Taft-Hartley Law. Such action would not, however, curtail or limit the responsibility and authority of the Executive Council.

"Your committee considered this matter most thoroughly. We recognize the untenable position in which the federal local unions are placed under existing circumstances and, therefore, recommend, with one vote, representing the United Mine Workers, dissenting, the adoption of this Constitutional revision." (Report of Proceedings, pp. 482, 483.

The amendment was adopted by the vote of the full convention. Report of Proceedings, p. 505). In discussing the proposed amendment several of the delegates made it perfectly clear that the proposed amendment was nothing more than a subterfuge. For example, John L. Lewis, President, United Mine Workers of America, delegate and AFL Vice President, stated:

"Your Committee comes in here with a Constitutional amendment which, of course, I am trying to oppose—just for the record—that puts in the printed word of the Constitution the claim that the American Federation of Labor will only have two officers. Well, that is not true. The Federation will continue to have 15 officers, 13 members of some kind of an Executive Council and a President and Secretary, which makes 15—although your Constitution will say that you only have two officers. Of course, the Council is going to have some duty, and if they are not officers of the Federation what will they be?

"You know, to me that smacks of the Communist technique, to lie to escape responsibility. That is what that does; that's a lie." (Report of Proceedings, p. 491)

* * *

". . . It is a matter of principle as to whether or not I should accept a position on a denatured governing body of this organization that will live a continuous lie as long as in the service, because that

tory policy. Actually, both of the Board's two decisions on the question resolve this question in accord with petitioner's position that in the circumstances of this case, it had no obligation to bargain with the union on September 19, 1947. In *Matter of Andrews Company*, 87 NLRB 379, the Board so held. In that case, a majority of the Board held that no obligation rests on an employer to bargain with a non-

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Board, whatever you call it, will be the officers of the American Federation of Labor, and it simply is not true that the American Federation of Labor will only have two officers." (Report of Proceedings, p. 492)

Daniel J. Tobin, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, delegate and AFL Vice President, stated:

"As a matter of fact, the question isn't of much importance. The changing of my title, or whoever will succeed me, from that of Vice President to Executive Council member means just exactly the same thing—no difference. We have the same powers and we will function just as before." (Report of Proceedings, p. 493)

* * *

"Let me say to you the only reason this amendment is before you is because we could not get unanimous action within the Council.

* * *

". . . My judgment is that it is the duty of this convention to amend that constitution, because in substance the amendment does not mean anything, while it does mean something to a quarter of a million members who are dependent upon us to help them." (Report of Proceedings, p. 494)

Delegate Cudahy (Federal Labor Union 22631) stated:

"The question is on the supplemental report of the Executive Council to eliminate the titles or positions of vice-presidents, in order to enable 280,000 federal labor union members to avail themselves of the facilities of the National Labor Relations Board. That is a commendable action, I think. However, I want to pose this question. We are talking about a law passed by a reactionary Congress being administered by the illustrious Mr. Denham and the National Labor Relations Board. We propose here to engage in what I think is the most childish kind of subterfuge. I don't suppose Mr. Denham was selected to administer this Act because he graduated from grade school day before yesterday or something like that. I think Mr. Denham can see through subterfuge as well as any legal adviser that the Government might instruct to administer this Act, and on behalf of the Union I represent I would like to pose this question: if the convention adopts the report of the committee, is it a foregone conclusion that those federal labor unions will enjoy the facilities of the Board, or is there still remaining some question as to what the ruling of the Board might be under changed circumstances?" (Report of Proceedings, p. 499)